

6-17-2014

## Reber v. State Appellant's Reply Brief Dckt. 41022

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IN THE SUPREME COURT OF THE STATE OF IDAHO

DWIGHT EARL REBER,	)	
	)	NO. 41022
Petitioner-Appellant,	)	
v.	)	KOOTENAI CO. NO. CV 2012-8463
	)	
STATE OF IDAHO,	)	APPELLANT'S
	)	REPLY BRIEF
Respondent.	)	
_____	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF KOOTENAI

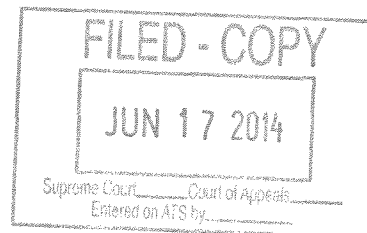
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## STATEMENT OF THE CASE

### Nature of the Case

Dwight Earl Reber appeals from the district court's order summarily dismissing his petition for post-conviction relief. He asserts that the district court erred by failing to rule on his motion to appoint conflict counsel.

### Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Reber's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto. Counsel for Mr. Reber wishes to note that footnote 1 in the Appellant's Brief was left in error and has no application to the case at hand as it is only applicable when the SAPD represents a client in death penalty case.

## ISSUE

Did the district court err by failing to rule on Mr. Reber's motion for conflict counsel?

## ARGUMENT

### The District Court Erred In Failing To Rule On Mr. Reber's Motion For Conflict Counsel

#### A. Introduction

Mr. Reber asserts that, once he requested that his attorney withdraw and that conflict counsel be appointed, the court was required to inquire into the alleged conflict. Because the district court did nothing, Mr. Reber asserts that the district court erred. In this Reply Brief, he acknowledges that *Murphy v. State*, 2014 WL 712695 (Feb. 25, 2014), forecloses his claim that he had a statutory right to effective assistance of counsel. However, *Murphy* is not final and a petition for rehearing has been filed. Mr. Reber still asserts that he was denied due process by the court ignoring his motion.

#### B. The District Court Erred In Failing To Rule On Mr. Reber's Motion For Conflict Counsel

The State first asserts that Mr. Reber did not have Sixth Amendment right to counsel in his successive petition for post-conviction relief. (Respondent's Brief, pp.4-5.) Mr. Reber does not dispute this. In his Appellant's Brief, he acknowledged that he did not have a Sixth Amendment right to counsel, but asserted that he had a statutory right to counsel for non-frivolous claims. (Appellant's Brief, p.5.)

In support of his claim that he had a statutory right to counsel to pursue non-frivolous claims, Mr. Reber asserted that, although the standard was the court "should" appoint counsel if there is the possibility of a valid claim, cases such as *Palmer v. Dermitt*, 102 Idaho 591 (1981), supported the proposition that a petitioner had a right to effective assistance of counsel in a post-conviction petition. Otherwise, an allegation of ineffective assistance of post-conviction counsel would not constitute a sufficient reason

to file a successive petition for post-conviction relief. (Appellant's Brief, pp.5-8.) Based on *Palmer*, Mr. Reber asserted that the Sixth Amendment standard for inquiry of a conflict applied. (Appellant's Brief, pp.8-10).

Subsequent to the filing of the Appellant's Brief, the Idaho Supreme Court decided *Murphy v. State*, 2014 WL 712695 (Feb. 25, 2014). In *Murphy*, the Idaho Supreme Court held that post-conviction petitioners do not have a statutory right to effective assistance of counsel and overruled *Palmer v. Dermitt*, holding that ineffective assistance of post-conviction counsel was not a sufficient reason to justify the filing of a successive petition for post-conviction relief. *Id.* at \*6. Mr. Reber acknowledges that *Murphy*, as it stands now, forecloses his claim that he had a statutory right to effective assistance of counsel. However, *Murphy* is not final and a petition for rehearing has been filed.

However, Mr. Reber also asserted that, "even if there is no statutory right to counsel in non-death penalty post-conviction actions, once the court appointed counsel, Mr. Reber was entitled to conflict-free counsel because, as set forth above, the appointment of counsel with a conflict of interest violates due process." (Appellant's Brief, p.7.) Mr. Reber asserted that the State must provide "minimum procedures" to assure that rights are not arbitrarily abrogated. (Appellant's Brief, p.7.)

In addition to arguing that Mr. Reber's claims are foreclosed by *Murphy*, the State also asserts that *Rios-Lopez v. State*, 144 Idaho 340 (Ct. App. 2007), also forecloses his claims. However, because *Rios-Lopez* recognizes that a petitioner may still have an interest in pursuing his claims even without a constitutional or statutory right, the State is incorrect.



In *Rios-Lopez*, the petitioner filed a successive petition for post-conviction relief, and also filed a motion for substitute counsel, asserting that counsel had failed to contact him. *Id.* at 341. The district court denied the motion after considering its merits during a status conference. *Id.* at 341-42. The Court of Appeals, after concluding that the petitioner did not have a statutory or constitutional right to counsel, held that the petitioner still possessed “an interest” in presenting his claims that implicated due process. *Id.* at 342.

Looking next to whether the procedure used by the district court would erroneously deprive the petitioner of his interest, the court noted that “[t]he district court did not ignore this request.” *Id.* at 343. Rather, the district court concluded that there were no grounds for substituting counsel, and the court requested that counsel contact the petitioner and notify him of her progress. *Id.* In this case, the district court *did* ignore the request. Thus, the district court failed to provide “minimum procedures to insure that the right is not arbitrarily abrogated.” (Appellant’s Brief, p.7.) Due process must provide an opportunity to be heard. *Rios-Lopez*, 144 Idaho at 343 (citing *Kramer v. Jenkins*, 806 F.2d 140, 141 (7<sup>th</sup> Cir. 1986)). By ignoring Mr. Reber’s request completely, the district court denied the minimum protections afforded by the due process clause. Thus, even if this Court agrees that Mr. Reber did not have a constitutional or statutory right to effective assistance of counsel, he still had a due process right to have his claims presented and the court denied him due process by ignoring his request for conflict-free counsel.

CONCLUSION

Mr. Reber requests that the district court's order summarily dismissing his petition be reversed and his case remanded for further proceedings.

DATED this 17<sup>th</sup> day of June, 2014.

  
\_\_\_\_\_  
JUSTIN M. CURTIS  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17<sup>th</sup> day of June, 2014, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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ISCI  
PO BOX 14  
BOISE ID 83707

BENJAMIN R SIMPSON  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

KENNETH K JORGENSEN  
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EVAN A. SMITH  
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